In a unanimous opinion written by Judge Fay and joined by Judges Carnes and Birch, the Eleventh Circuit reversed the judgment of the District Court and ordered judgment entered in favor of DCC. The Court did not rule on DCC's causation argument, but did note that evidence supporting Petitioner's theory on that issue "remains notably absent." *Flury v. DaimlerChrysler Corp.*, 427 F.3d 939, 945 n. 12 (CA11 2005). The Court likewise declined to rule on DCC's argument that Mr. Riner's testimony should have been excluded under Rule 702. The Court did note, however, that "the reliability [of Mr. Riner's testimony] remains questionable," and that the exclusion of "Riner's expert testimony would have the same practical effect as dismissal." *Id.* at 946, 945 n. 12.

The Court did address the merits of DCC's spoliation argument. The Court held that federal law governs this issue, but said it would also "examine the factors enumerated in Georgia law." *Id.* at 944. In a detailed analysis, the Court observed that "Plaintiff's failure to preserve the vehicle resulted in extreme prejudice to the defendant, and failure to respond to defendant's letter displayed a clear dereliction of duty." *Id.* at 945. The Court held that "[n]o lesser sanction [than dismissal] will suffice in this case[,]" noting as well that "[d]ismissal is clearly warranted under Georgia law." 427 F.3d at 944, 945. Accordingly, the Court ordered judgment entered in favor of DCC.

REASONS FOR DENYING THE WRIT

1. Petitioner contends this Court should review the Eleventh Circuit's determination that federal rather than state law governs the imposition of spoliation sanctions in a diversity case. As shown below, that issue is not worthy of this Court's review and is immaterial to the outcome of this case.

a. There is a lopsided split among the Circuits as to whether state or federal law governs the imposition of spoliation sanctions in a diversity case. Eight Circuits hold that

federal law governs this issue. Three of them, including the Eleventh Circuit in the decision below, have expressly so held. *See Flury*, 427 F.2d at 944 ("federal law governs the imposition of spoliation sanctions"); *Silvestri* v. *General Motors Corp.*, 271 F.3d 583, 590 (CA4 2001) ("We conclude . . . that a federal law of spoliation applies"); *King* v. *Illinois Central Railroad*, 337 F.3d 550, 556 (CA5 2003) ("federal law governs whether the district court abused its discretion in rejecting King's spoliation argument"). Five other Circuits have applied federal law to the issue without discussion of their choice of law. *See Trull* v. *Volkswagen of America*, 187 F.3d 88, 95 (CA1 1999); *West* v. *Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (CA2 1999); *Dillon* v. *Nissan Motor Co., Ltd.*, 986 F.2d 263, 266-67 (CA8 1993);[1] *Glover* v. *BIC Corp.*, 6 F.3d 1318, 1329 (CA9 1993); *Aramburu* v. *The Boeing Co.*, 112 F.3d 1398, 1407 (CA10 1997) (applying federal spoliation law to both state and federal claims).[2]

Only two Circuits have held that state law governs the imposition of spoliation sanctions in diversity cases, and nei-

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[1] *But see Stevenson* v. *Union Pacific Railroad Co.*, 354 F.3d 739, 746 (CA8 2004) ("We need not and do not reach any choice of law question [regarding spoliation sanctions] because the standard is the same under either state or federal law"); *Menz* v. *New Holland North America, Inc.*, 440 F.3d 1002, 1006 (CA8 2006) ("We need not and do not decide whether state or federal law governs [spoliation sanctions] in this diversity action because the result is the same under both").

[2] Petitioner incorrectly asserts that the Tenth Circuit applies state law to the issue of spoliation sanctions, citing *Colletti* v. *Cudd Pressure Control*, 165 F.3d 767 (CA10 1999). But *Colletti* involved a putative claim for affirmative relief, styled as a claim for "fraudulent creation of evidence," rather than a request for spoliation sanctions. *See id.* at 775 n. 6 ("Ms. Colletti does not argue evidence was destroyed, but that Cudd fraudulently created evidence for its advantage, and that the Wyoming Supreme Court would recognize her proposed cause of action"). And the *Colletti* Court merely predicted that the Wyoming Courts would not recognize such an affirmative claim for relief. *Id.* at 775.

ther provided significant reasoning in doing so. In *Nationwide Mutual Fire Ins. Co.* v. *Ford Motor Co.*, 174 F.3d 801, 804 (CA6 1999), the Court stated that "[t]he rules that apply to the spoiling of evidence and the range of appropriate sanctions are defined by state law[.]" But the *Nationwide* Court offered no reasoning for that proposition, and instead merely cited *Welsh* v. *United States*, 844 F.2d 1239, 1245 (CA6 1988) as authority for its position. And *Welsh* in turn applied Kentucky law to the issue of spoliation sanctions without any discussion as to why it should apply. *See id.* at 1247-49. Similarly, in *Allstate Ins. Co.* v. *Sunbeam Corp.*, 53 F.3d 804 (CA7 1995), the Court stated, as its basis for applying state law, only that "the parties agree that in this case the pre-suit duty to preserve evidence is governed by Illinois law." *Id.* at 806.

This is hardly the stuff of a considered disagreement among the Circuits. Given the absence of reasoning supporting the minority position, it would appear that this issue—to the extent it is certworthy at all—is unripe for this Court's consideration. Moreover, given the lopsided nature of the split, the recent authority stating a reasoned basis for the majority position, and the relatively dated nature of the contrary authority, the split may well resolve on its own.

b. The split is also of minimal practical significance. The reality is that—as DCC expressly noted in its brief below, *see* Defendant-Appellant's Brief at 26-27—courts routinely cite authority from other jurisdictions, both state and federal, in deciding spoliation issues. Indeed, DCC declined even to take a position as to whether state or federal law applied, since resolution of that issue would not affect the outcome of the case. *See id.* at 27. Numerous other Courts have made the same observation in cases presenting the issue. *See Schmid* v. *Milwaukee Electric Tool Corp.*, 13 F.3d 76, 78 (CA3 1994) (noting that "[t]he parties have referred us to no case law. . . suggesting that the applicable federal and state

law are materially different[,]" and concluding that "we need not resolve the choice of law question"); *Cole* v. *Keller Industries, Inc.*, 132 F.3d 1044, 1047 n. 1 (CA4 1998) ("for the present appeal, the result, no matter how arrived at, would be the same as we reach in this decision"); *Stevenson* v. *Union Pacific Railroad Co.*, 354 F.3d 739, 746 (CA8 2004) ("We need not and do not reach any choice of law question [regarding spoliation sanctions] because the standard is the same under either state or federal law"); *Menz* v. *New Holland North America, Inc.*, 440 F.3d 1002, 1006 (CA8 2006) ("We need not and do not decide whether state or federal law governs [spoliation sanctions] in this diversity action because the result is the same under both").

The decision whether to apply state or federal law to the issue of spoliation sanctions, then, often makes little difference in practice. The reason for this is simple. Assessing the prejudice resulting from the spoliation of a particular item of evidence, and crafting a remedy to cure it, are highly fact-intensive tasks. *See, e.g., Trevino* v. *Ortega*, 969 S.W.2d 950, 953 (Tex. 1998) ("there is no one remedy that is appropriate for every incidence of spoliation; the trial court must respond appropriately based upon the particular facts of each individual case"). Thus, the considered judgment of other courts that have encountered similar factual situations may be of greater help than factually dissimilar authority from within the same jurisdiction. The result is that, regardless of the law nominally applied, the spoliation analysis frequently crosses jurisdictional lines. *See, e.g., Silvestri*, 271 F.3d at 590 (holding that federal law applies, but noting that "we have recognized the articulation of spoliation principles from some of the New York cases cited to us"); *Flury*, 427 F.3d at 944 ("Applicability of federal law notwithstanding, our opinion is also informed by Georgia law"). And the resources of this Court are too scarce to dedicate to issues more nominal than practical.

c. Further, this case is an inappropriate vehicle for resolving the choice-of-law issue. Although the Eleventh Circuit nominally applied federal law, its analysis was "informed by Georgia law" and indeed hewed closely to that law throughout. *See* 427 F.3d at 944, 944-47. The Court further noted that "Georgia state law on spoliation is wholly consistent with federal spoliation principles[,]" and that "*[d]ismissal is clearly warranted by Georgia law.*" *Id.* at 944, 945 (emphasis added). Thus, even if this Court were to reverse the Eleventh Circuit's determination as to the applicable law, the outcome of this case would not change.

d. Finally, Petitioner made no argument in the Eleventh Circuit as to whether state or federal law governs the issue of spoliation. *See* Plaintiff-Appellee's Brief at 20-22. Petitioner therefore waived that issue, and should not be permitted to argue it for the first time here.

2. Petitioner contends that, if federal law governs the imposition of spoliation sanctions in diversity cases, this Court should review the decision below to establish a uniform set of standards for imposing them. This issue does not warrant this Court's review, and this case is a poor vehicle to address it.

a. Any split on this issue is ill-defined. As noted above, the spoliation analysis is peculiarly fact-intensive, and thus peculiarly *ad hoc*. By its nature, then, the issue tends not to lend itself to a clear and definite split.

Courts broadly agree that the degree of fault by the spoliator and prejudice to the affected party lie at the heart of the analysis. For example, the Eleventh Circuit held in this case:

> "In determining whether dismissal is warranted, the court must consider: (1) whether the defendant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practi-

> cal importance of the evidence; (4) whether the plaintiff acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence is not excluded." 427 F.3d at 945.

Similarly, the Third Circuit has held:

> "We believe the key considerations in determining whether such a sanction is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the opposing party is seriously at fault, will serve to deter such conduct by others in the future." *Schmid,* 13 F.3d at 79.

See also, e.g., Dillon, 986 F.2d at 266-67 (noting that "dismissal may be ordered as a sanction upon a finding of bad faith, willfulness, or fault[,]" but that "there must also be a finding that the destruction prejudiced the opposing party").

Within these broad parameters, any differences in the factors considered from one case to the next may be attributable more to differences in factual context or the particular remedy at issue, than to disagreements about the law. For example, Petitioner asserts that Courts differ as to whether a finding of "bad faith" is necessary for the imposition of spoliation sanctions. Upon scrutiny, however, these differences are seen to be ones of context.

The caselaw from the Fourth Circuit illustrates the point. In *Cole,* the Court held that the sanction of dismissal was improper "absent bad-faith conduct[.]" 132 F.3d at 1047. But when faced with a showing of greater prejudice—indeed in another airbag case materially identical to this one—the Court held:

> "We agree with [the plaintiff] that dismissal is severe and constitutes the ultimate sanction for spoliation. It is *usually* justified only in circumstances of bad faith or

> other 'like action.' [Citing *Cole.*] But even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case. As the Supreme Court noted in *Chambers,* the district court has discretion 'to fashion an appropriate sanction for conduct which abuses the judicial process.'" *Silvestri,* 271 F.3d at 593 (emphasis added) (quoting *Chambers* v. *NASCO, Inc.,* 501 U.S. 32, 44-45 (1991)).

Thus, what might have initially appeared to be a difference as to the applicable rule, is instead revealed to be a difference in factual context.

The point is again illustrated by the Tenth Circuit's decision in *Aramburu,* which Petitioner cites as authority for a putative split as to whether bad faith is required for the imposition of spoliation sanctions. That case, unlike *Flury,* involved an adverse-inference instruction, based upon the destruction of certain records. The *Aramburu* Court held that "[t]he adverse inference must be predicated on the bad faith of the party destroying the records." 112 F.3d at 1407. But the Court's reasoning for that requirement was peculiar to the particular remedy at issue: "Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case." *Id.* As then-Judge Breyer explained in a similar context:

> "The evidentiary inference [for the adverse inference] is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. The fact of destruction satisfies the minimum requirement of relevance: it has some tendency, however small, to make the existence of a fact at issue more probable than it otherwise would be. *See* Fed.R.Evid. 401. Precisely how the document might

> have aided the party's adversary, and what evidentiary shortfalls its destruction may be taken to redeem, will depend on the particular facts of each case, but the general evidentiary rationale for the inference is clear." *Nation-Wide Check Corp.* v. *Forest Hills Distributors, Inc.*, 692 F.2d 214, 218 (CA1 1982).

The sanction of dismissal, in contrast, is not based on any such inference regarding the spoliator's state of mind. It may instead be based on the simple fact that "[t]he resulting prejudice is incurable by any sanction other than dismissal." *Flury*, 427 F.3d at 947; *see also, e.g., Silvestri*, 271 F.3d at 593 ("dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to defend its case"). Thus, what might at first glance appear to be a split as to whether bad faith is required for the imposition of "spoliation sanctions," is instead shown to be a difference in the particular remedies at issue.

b. Moreover, there certainly is no split as to whether the sanction of dismissal was proper in the particular circumstances present here. On this point *Flury* and *Silvestri* are in perfect accord. In *Silvestri*, as here, the plaintiff alleged the subject vehicle contained a manufacturing defect that caused its airbags not to deploy in the subject crash. (Unlike a design defect, which by definition is common to all vehicles sharing the challenged design, a manufacturing defect is unique to the particular vehicle at issue.) And there, as here, the plaintiff allowed the vehicle to be spoliated before the defendant manufacturer had any opportunity to inspect it.

In *Silvestri*, the Fourth Circuit held that General Motors was "highly prejudiced" by the vehicle's spoliation, because it could not examine the airbag's "sensing and diagnostic control module," 271 F.3d at 592, or "develop a 'crush' pattern to prove that the airbag properly failed to deploy." *Id.* at 594. Similarly, the Eleventh Circuit held here: "Defendant was severely prejudiced as a result of the vehicle's destruc-

tion. Specifically, defendant did not have an opportunity to examine the vehicle's crush pattern, its airbag control module, or its present condition." 427 F.3d at 939. The Eleventh Circuit then explained in some detail why the inability to examine those things were prejudicial to DCC. *Id.* Moreover, the prejudice here was arguably even greater than in *Silvestri,* "because a few months prior to this accident, [Mr. Flury] had collided with a deer and had sustained substantial damage to the front and side of [the subject] truck." *Id.* at 946 n. 13.

In each case, then, the defendant manufacturer was left to defend against an alleged manufacturing defect—the nature of which was never identified in either case—without access to the product alleged to be defective. In *Silvestri,* the Court concluded that the vehicle's spoliation "denied General Motors access to the only evidence from which it would develop its defenses adequately." 271 F.3d at 594. Similarly, in *Flury,* the Court concluded that "Plaintiff's spoliation of critical evidence deprived the opposing party of an opportunity to put on a complete defense." 427 F.3d at 947. And in both cases, the Courts agreed that dismissal was the only effective cure. Thus, on the particular issues presented here, there is no split of authority.[3]

c. In addition, this case is a poor vehicle for resolving any putative split as to whether a showing of bad faith is required for the imposition of spoliation sanctions. Any such split is not implicated by the facts of this case. Petitioner has already had the benefit of the rule he presumably seeks: The Eleventh Circuit expressly held in this case that "[d]ismissal represents the most severe sanction available to a federal court, and therefore should only be exercised *where there is a*

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[3] It also bears mention that, "[i]n this particular case, even applying the lesser sanction of excluding [Petitioner expert Barry] Riner's testimony would have the same practical effect as dismissal. In the absence of Riner's testimony, defendant would be entitled to judgment as a matter of law under Fed.R.Civ.P. 50." 427 F.3d at 939.

showing of bad faith and where lesser sanctions will not suffice." *Id.* at 944 (emphasis added). Any review of this issue would amount to error-correction at best.

And there is no error to correct. The Eleventh Circuit summarized Petitioner's culpability for the vehicle's spoliation:

> "The record reveals that plaintiff knew the location and condition of the subject vehicle for a considerable amount of time following the accident. Moreover, plaintiff was fully aware that defendant wished to examine the vehicle. Knowing this, plaintiff ignored defendant's request and allowed the vehicle to be sold for salvage without notification to defendant of its planned removal. Even absent defendant's unambiguous request for its location, plaintiff should have known that the vehicle, which was the very subject of his lawsuit, needed to be preserved and examined as evidence central to his case. Plaintiff's failure to preserve the vehicle resulted in extreme prejudice to the defendant, and failure to respond to defendant's letter displayed a clear dereliction of duty." *Id.* at 944-45.

See also id. at 946 ("Prejudice to the defendant was great, and culpability rested solely upon the plaintiff"); *id.* at 947 ("Defendant's attempt to ascertain the vehicle's location for inspection was inexplicably ignored").

d. Moreover, Petitioner made no argument in the Eleventh Circuit as to the standards that should govern the imposition of spoliation sanctions. *See* Plaintiff-Appellee's Brief at 20-22. Petitioner therefore waived that issue, and again should not be permitted to argue it for the first time here.

3. Finally, the Eleventh Circuit's opinion reveals two other potential bases for reaching the same decision in this case. First, the Court's opinion makes clear that Petitioner failed to prove causation, which was an element of his claim under Georgia law. Petitioner's theory was that the airbag's nondeployment permitted forward flexion of his back, which

in turn caused his alleged lower-back injury. But the Court noted that "evidence attributing prevention of forward flexion to proper airbag function remains notably absent. In fact, the only testimony in this area suggests that airbags are not designed to protect the lower back, but rather the upper torso." 427 F.3d at 945 n. 12.

Second, Respondent argued below that the testimony of Petitioner's expert, Barry Riner, should have been excluded as unreliable under Rule 702. The Eleventh Circuit noted that "the reliability of [that testimony] remains questionable." 427 F.3d at 946. And the Court further noted that, "[i]n the absence of Riner's testimony, defendant would be entitled to judgment as a matter of law under Fed.R.Civ.P. 50." 427 F.3d at 945 n. 12. Thus, the Court's opinion makes clear that any challenge to its spoliation holding would not affect the outcome of the case.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BRYANT FLURY, PETITIONER

v.

DAIMLERCHRYSLER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF

STATEMENT OF ADDITIONAL FACTS

At least three Circuit Courts of Appeals apply state law standards when considering spoliation of evidence issues, however, the Courts of Appeals from many of the remaining circuits also "borrow" state standards since there are no Federal standards and this in effect results in a further split in the circuits since different standards are used by the various states and circuits.

The facts show that Flury had no control over the removal and disposal of the wrecked truck. This was done by State Farm without any notice to Flury. Flury notified DCC about the wreck and defective air bag system on November 22, 1996, and DCC did not respond until January 3, 1997, and asked for an expert's reports, pictures, as well as location. Before Flury could compile this information State Farm moved the vehicle. DCC did nothing to follow up and took no action to preserve the vehicle. Flury's pick-up was a total loss. (R-11 at 66-67; R-11 at 131-133).

Although the vehicle was not available for DCC's expert to inspect, Flury presented undisputed evidence from an independent witness in person, not by deposition, to-wit: David Baxter that the air bag system was not changed or altered. (R-11-150 at 119).

Flury testified in person that he was traveling at least 35 MPH when he collided with the tree. (R-11-149 at 57)

Flury also presented the live testimony of Barry Riner, an Accident Reconstructionist, who outlined the standards for air bag deployment required by the

C.F.R., to-wit: The air bag, if functioning properly, should deploy if a vehicle strikes a fixed object such as a 12 inch pine tree dead center at a speed over 15 MPH (B.E.V.). (R-11 at 154)

Flury also presented the pictures he secured from David Baxter showing the truck struck the tree dead center. Neither party had an expert who examined the vehicle and both parties had to rely upon the pictures.

Flury presented the testimony of Dr. Dwain Clay who clearly documented and testified that if Flury was thrown forward it would put additional pressure on his back and enhance the injury. This opinion was recognized and taught in the medical field and published in a text book. (R14-150 at 52, Line 1 through 53, Line 18).

The facts clearly support Flury's claim against DCC and it is right for the Court to reverse the Court of Appeals and reinstate the judgment of the District Court and jury.

ISSUES

(1) Should this Court grant Certiorari to establish uniform standards which should be applied by all Federal Courts in spoliation cases?

(2) What standards should the Court establish for use in judging spoliation issues in Federal Court?

(3) Should the discretion to determine whether sanctions should be applied and the sanctions to be applied be vested in the District Court or the Court of Appeals?

OPPOSITION TO ARGUMENT OF DCC

The introductory paragraph by DCC is far from true. As this Court will notice the three judge panel in this case recognized the split among the Circuits and the absence of a Federal Standard.

> This is a diversity suit, therefore, we must determine as a threshold matter whether to apply state or federal law. See *Hanna v. Plumer*, 380 U.S. 460, 14 L.Ed.2d 8, 85 S. Ct. 1136; 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed. 2d 8 (1965). Courts are split as to the question of whether state or federal law governs the imposition of sanctions for spoliation of evidence in a diversity suit. The majority of circuits have found that federal law applies. See, e.g., *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449-50 (4th Cir. 2004) (imposition of sanctions for spoliation is an inherent power of federal courts and the decision to impose them is governed by federal law); see also *King v. Illinois Central Railroad*, 337 F.3d 550, 556 (5th Cir. 2003) (federal courts generally apply their own evidentiary rules in diversity matters, therefore, federal law governs whether a district court abused its discretion in declining to apply spoliation sanctions). Other jurisdictions apply state law. See *Nationwide Mutual Fire Insurance Company v. Ford Motor Co.*, , 174 F.3d 801, 804 (6th Cir. 1999).
>
> We agree with the first view, that federal law governs the imposition of spoliation sanctions. Furthermore, in accordance with the fourth and fifth circuits, we conclude that federal law

applies because spoliation sanctions constitute an evidentiary matter. See *Cole v. Keller Industries Incorporated*, 132 F.3d 1044, 1046 (4th Cir. 1998); see also *King*, 337 F.3d at 556 (5th Cir. 2003). This view is consistent with the law of our circuit regarding the rules of evidence, where we have held that, "in diversity cases, the Federal Rules of Evidence govern the admissibility of evidence in the federal courts." *Johnson v. William C. Ellis & Sons Works, Inc.*, 609 F.2d 820 (5th Cir. 1980).[11] Thus, we conclude that federal law governs the imposition of sanctions for failure to preserve evidence in a diversity suit.

Applicability of federal law notwithstanding, our opinion is also informed by Georgia law. Federal law in this circuit does not set forth specific guidelines, therefore, we will examine the factors enumerated in Georgia law. See *Silvestri v. General Motors Corporation*, 271 F.3d 583, 590 (4th Cir. 2001) (concluding that although federal law of spoliation applies, the court will recognize principles from some of the state cases cited to them). Georgia law provides some guidance and was relied upon by the district court and the parties. Moreover, Georgia state law on spoliation is wholly consistent with federal spoliation principles.

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[11] *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (Eleventh Circuit adopts as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

In addition to the circuits which pass on the issue of spoliation under state law, many of the other circuits use the law of the State where the case is tried when deciding the issue of spoliation of evidence since there are no Federal standards.

DCC contends the Court should not grant Certiorari because the result would be the same under Federal law or State law. That is not true. That argument ignores the fact that there is no Federal law to use in spoliation cases and the Georgia law would require that the judgment of the District Court and jury be affirmed and that it is not mandatory that the trial judge dismiss a petition or answer if evidence has been spoliated. The Georgia cases the three Judge Panel relied upon to inform them of the law in Georgia specifically hold that although a trial judge may dismiss a Plaintiff's Complaint, dismissal is not mandatory.

> Thus, the narrow issue presented is whether the trial court abused its discretion in refusing to impose harsher sanctions. In other words – whether dismissal or evidence exclusion is mandated as a matter of law. It is not...
>
> Dismissal of a case is the ultimate sanction, and such sanction is not required here. Although the defendants are hampered by the lack of evidence, so, too, is Campbell. Because the trial court excluded evidence from any witness that actually inspected the truck or tires, all parties are limited to the photographs to present their case. The defendants, who sought exclusion of the photographs, suggest that the pictures are not helpful because they were taken by Campbell and his father, who are unqualified to

> take such forensic photographs. Again, however, the defendants are free to point out the lack of evidentiary value of the photographs, which Campbell also must use to sustain his claim. Thus, the trial court has crafted a viable remedy, which we will not disturb on appeal. *Bridgestone/Firestone North American Tire, LLC, et al., v. Campbell*, 258 Ga. App. 767, 574 S.E.2d 923 (2003).
>
> Also see *Chapman, et al. v. Auto Owners Insurance Company*, 220 Ga. App. 539, 469 S.E.2d 783.

The facts of the *Bridgestone/Firestone North American Tire, LLC, et al v. Campbell*, 258 Ga. App. 767, 574 S.E.2d 923 (2003), case are very similar to the facts of this case and the Court approved the sanctions the trial Court fashioned to apply in that case and clearly held that dismissal was not mandatory.

Although there are more circuits that say they use the Federal standard most of these in fact follow the State standard where they sit and the standards vary significantly from circuit to circuit. In summary the split among the Circuit Court of Appeals is not only based upon those that clearly follow State standards but the split is also based upon the Courts that apply very different standards which they "borrow from the State where they are sitting and call them Federal standards". Should the Court now establish uniform Federal Standards for the various circuits to use so the admission of or exclusion of evidence would not vary depending on where the case is filed?

The contention by DCC that Flury failed to argue the conflict among the circuits is untrue. See

Page 23 of Motion for Rehearing and Rehearing En Banc. Since there are no Federal standards the Circuit Courts of Appeals "borrow" the State standards where the case is filed. This results in an almost complete split among the Circuits with some of the Circuit Courts of Appeals openly relying on State standards and other circuit Courts of Appeal "borrowing" the standards from the State where they sit. This often results in different standards in the same circuit because they don't use a composite of standards from all states in the Circuit, but use the standards of the state where the case is pending. For instance, the Eleventh Circuit Court of Appeals claimed to be informed by the Georgia law not a composite of law from Georgia, Florida and Alabama.

In this case if this Court establishes the Federal standards that should be followed by the District Court and determines that the District Court not the Court of Appeals has the discretion to determine the sanctions, the mandatory dismissal will be vacated and the judgment of the District Court and jury will be reinstated.

This leaves us with a very current and important issue which every Circuit Court sitting in every state faces, that is what standard the various District Courts should apply to determine whether sanctions should be applied. At present the Circuit Courts of Appeals must deal with this issue against a party for spoliation of evidence in product liability cases and other cases and, if so, what sanctions should be applied all without any Federal standard to guide them. Contrary to DCC, this issue cannot resolve itself without leadership from this Court.